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Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

LLOYD U. NSEK, Sr., - *Petitioner*

v.

CIRCLE K STORES et al. - *Respondents*

On Petition For Writ Of Certiorari
To The Court of Appeal for the
State of California Fourth Appellate District
Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On May 4, 2004 by invitation of the Court of Appeal, Fourth Appellate District, Division Two, the herein petitioner in pro per, Lloyd Nsek, invoked the legal authorities of Statute §74 and Statute §128 in his oral amended pleadings with regards to his discrimination case before the Court. In response, the Appellate Court has remained invariably silent on the amended pleadings leaving petitioner in absolute darkness. In California, informed citizens are aware that these Statutes are within the jurisdictional power of the legislature; they are vital to the welfare of society and are favored by law; they provide all citizens the much needed repose, and as such constitute meritorious defenses. Hence, the petitioner presents the United States Supreme Court with the following question below:

- Is there a separate set of procedural and appellate jurisdictional rules that govern amended pleadings and appeals on demurrers based on statute of limitations, or is society in California to continue to repose its hopes in the efficacy of California rules of Court, rule §74 and rule §128 in the court of law: i.e. (1) an amended complaint supersedes all prior complaints; and (2) a Court of Appeal is not to supplant an amended complaint using silence.

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

The United States Constitution: The Fourteenth Amendment.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeal for the State of California, Fourth Appellate District, Division Two to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was May 17, 2004. A copy of that decision appears at Appendix A. A timely petition for rehearing was thereafter denied on the following date: June 7, 2004.

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved in this discrimination case are as follows:

U. S. Constitution: Fourteenth Amendment [section 1.] states the following:

- All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California rules of court, rule §74 states the following:

- A demurrer based on the statute of limitations will not lie where the action may be, but is not necessary. In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the Complaint; it is not enough that the Complaint shows that the action may be barred.

California rules of court, rule §128 states the following:

- On appeal from a judgment of a dismissal following the sustaining of a demurrer without leave to amend, the reviewing court must accept as true not only those facts alleged in the complaint but also facts that may be implied or inferred from those expressly alleged.

California Government Code §12960 et seq., states in relevant part the following:

- Any person claiming to be aggrieved by an alleged unlawful practice may file with the Department of Fair Employment and Housing [DFEH] a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign, and file a complaint. No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except that this period may be extended as follows: (1) For a period of time not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence….

California Government Code Section 12965(b) states in relevant part the following:

- If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on his or her request, the right-to-sue notice. This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency

named in the verified complaint within one year from the date of that notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint....

STATEMENT OF THE CASE

On May 17, 2004 the Appellate court, as its opinion, affirmed the trial court's judgment granting Defendant Tosco Marketing Company's demurrer to Plaintiff Lloyd Nsek's complaint for employment discrimination on the ground that it was barred by the one-year statute of limitations set forth in Government Code Section §12960. Being, as it currently stands, a Demurrer sustained without leave to amend, Appellant invariably bears the burden of proving there is a reasonable possibility of amendment.

To satisfy that burden, Appellant herein clearly and specifically, set forth the applicable substantive law[s] and the legal basis for amendment. In doing so, Appellant herein offers allegations to support the possibility of amendment with legal authority, showing the viability of new causes of action. As a result, Appellant's argument, as set forth, serves to establish the basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.

So far, neither the trial court, Respondent nor the Appellate court has yet alleged, with legal authority, that the Department of Fair Employment & Housing (DFEH) had no duty (administrative or ministerial) accepting the photo-copy of Appellant's DFEH complaint on May 9, 2001 in lieu of the original ---filed by mail signed and dated March 9, 2000. Therefore, it remains, for the record, that all arguments before this Court on the demurrer at issue, either from Appellant or Respondent, stem from and hinges on all the material facts that

[clearly and affirmatively appear] on the same face of this very DFEH complaint photo-copy.

Therefore as a photocopy of Appellant's DFEH complaint, it holds, on its very face, substantive facts entrenched in the original document such as (1) March 9, 2000 ---the filing date of the original complaint by mail, and (2) the 1st signature. As a result of its acceptance by the DFEH in lieu of the original [albeit misplaced or lost by DFEH] this same complaint also holds on the same face (1) the DFEH stamp that reads, "received as of May 9, 2001, and (2) the 2nd signature --- which authenticates the document as being a photocopy. Hence, by all accounts in relation to the elements in this appellate matter, this DFEH complaint is not the typical case before this court. As a result, the general demurrer rule does not apply.

The legal community knows that no court is to assume the truth of contentions, deductions or conclusions of fact or law. Therefore, when the trial court sustained Respondent's demurrer on the instant pleadings from selective facts, while turning a blind eye to those other facts [which clearly and affirmatively appear as well on the same face of the DFEH complaint], and refused to rely on the judicial file [containing adequate DFEH documents to support Mr. Nsek's claim of compliance with Govt. Code §12960] on amended pleadings, it was an error that raised a question of law.

Legally, it was a question of California rules of court, rule §128 [in relevant part] that asks the court to also *accept as true, facts that may be implied or inferred from those expressly alleged.* Further, it was also a question of California rules of court, rule §74 [in relevant part] that asks the court to note that *it is not enough that the complaint shows the action may be barred.*

Since these laws exist to the extent of having a direct bearing on this discrimination case, then by ignoring these laws, the trial court, in that regard, is simply assuming the truth of contentions, deductions or conclusions of fact or law

erroneously presented by Respondent in this discrimination case.

Given these statutory provisions in California, to affirm the judgment is an attempt by the Appellate court to challenge, if not to deny, out right, DFEH administrative autonomy to process complaints by mail, along with all the associated risks and unforeseeable circumstances beyond ones control. (See Armentrout v. Aaron Rents, Inc., No. 7:01cv757 (W. D. Va. Feb. 27, 2003).

Further, to continue to affirm the judgment is an attempt by the Appellate court to challenge the legal authorities of rule §74 and rule §128 on account of the amended pleadings [during the oral argument on May 4, 2004] that superseded all prior pleadings in court. (See Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 884; Lee v. Bank of America (1994) 27 Cal. App. 4th 197, 215.)

Also, it is an attempt to challenge, if not to deny, out right, DFEH jurisdictional discretion to resolve matters of statute of limitations, regardless of how cumbersome they seem to be, involving cases timely initiated [squarely within statute of limitations time line] by complainants with the agency pursuant to Government Code §12960 requirements.

Therefore given all these facts surrounding this discrimination case, Mr. Nsek filed a petition for rehearing with the Court of Appeal on June 1, 2004 to demonstrate there is a reasonable possibility the defect can be cured by legal amendment. On June 7, 2004 Appellant's petition for rehearing was denied. Notwithstanding the outcome, Mr. Nsek filed, on June 24, 2004 a Petition for Review in the Supreme Court of the State of California. On July 28, 2004 Mr. Nsek's Petition for Review was denied [see Appendix C].

REASONS FOR GRANTING THE PETITION

On May 4, 2004 the Court of Appeal, Fourth Appellate District, Division Two, granted an oral argument hearing on this case of Nsek v. Circle K Stores, et al. shortly following its tentative opinion ruling, affirming the trial court judgment. On May 17, 2004 the Court of Appeal, after the oral argument, issued its unpublished opinion [see Appendix A] still affirming the trial court, word for word and line by line, as in the tentative opinion.

In doing so, the Court of Appeal remained **absolutely "Silent"** on the entire oral argument, which, on the one part, it was the Appellant's amended pleadings with the citing of legal statutes [§74 and §128, respectively] in conjunction with case precedent of Marshall v. Gibson, Dunn & Crutcher (1995) 37 Cal. App. 4th 1397 to support the possibility of amendment with legal authority, showing the viability of new causes of action. As a result, Appellant's oral argument [*available only as court copy CD*] before the Court of Appeal served to establish the basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.

The fact that the Appellate court chose, as within the context of its discretion, to remain silent on the entire oral proceedings of May 4, 2004 with respect to its unpublished opinion of May 17, 2004 still raises a question of law. That very question of law is apt to be the following: **Does amended pleadings supersede prior pleadings in a civil action?** In every other civil action, an amended complaint supersedes all prior pleadings, with the result that the prior pleadings are extinguished, as if they did not exist. (Avalon Painting Co. v. Alert Lbr. Co. (1965) 234 Cal. App. 2d 178, 182; Schaefer v. Berinstein (1956) 140 Cal. App. 2d 278, 284.)

Prior complaints, superseded by an amended complaint, cease to perform any function as a pleading. (See Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 884; Lee v.

Bank of America (1994) 27 Cal. App. 4th 197, 215.) Therefore, Appellant's oral argument before the Court of Appeal on May 4, 2004 supersedes all prior pleadings [performed by former Counsel for Appellant] at the trial court.

Therefore, the unpublished opinion of the court being, as it stands, absolutely silent on the oral amended pleadings by the Appellant [in Pro Per], begs the legal question of whether rules of pleading and Appellate jurisdiction as well as discretion should result in the violation of ones Constitutional Rights under the 14th Amendment.

The purpose of a statute of limitations is to prevent the assertion of stale claims after the lapse of long periods of time, during which, evidence may have been lost, destroyed or become unavailable. However, statute of limitations cases are reviewed by the courts under specified guideline of the State rules of court. In California, statute of limitations rulings on demurrer are reviewed as specified under the California rules of court, rule §74 as well as rule §128, respectively.

Accordingly, there is nothing in the language of these two statutes that supports the Appellate court being silent, partial or bias. As was judicially noticed in the trial court, Mr. Nsek's evidence of compliance under FEHA is not entirely lost. Invariably, it is the trial court's refusal to rely on the judicial notice of the file coupled with the Appellate court's silence on the oral amended pleadings that complicates this discrimination case.

In the opinion of the Appellate court, the following is clearly stated: The actual complaint is dated March 9, 2000, but stamped as received on May 9, 2001 [see Appendix A, pg 17a]. These very conflicting facts, which appear on the same face of the complaint, form the basis for Respondents' demurrer at issue, sustained by the trial court without leave to amend. This petition argues the trial court's ruling was in error as set forth below.

THE DEFECT OF THE DEMURRER CAN BE CURED BY LEGAL AMENDMENT WITHIN THE MEANING OF CALIFORNIA RULES OF COURT, RULE § 74 TO SHOW CAUSE FOR LEGAL ACTION AGAINST RESPONDENT.

This reasoning is quite consistent with the meaning of California Rules of Court, rule § 74 that says, *"A demurrer based on the statute of limitations will not lie where the action may be, but is not necessary. In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the Complaint; it is not enough that the Complaint shows that the action may be barred."*

Therefore, as a legal resolution from the legal authority of rule §74, the demurrer in this case will not lie where the DFEH action of stamping the face of a Complaint photocopy received as of May 9, 2001 in lieu of the original DFEH Complaint (filed by mail, signed & dated March 9, 2000) albeit misplaced or lost by DFEH. Therefore, within the meaning of rule § 74, it is not enough that this Complaint photocopy before the lower court show that the DFEH action may be barred, since the alleged defect is now appearing on the same face of the Complaint photocopy itself, which is in conflict with existing data and facts such as the March 9, 2000 date referencing the filing date of the original Complaint that denotes Appellants strict compliance with Govt. Code §12960. Court records show Mr. Nsek was wrongfully terminated on September 7, 1999. He opened a case file with the DFEH on September 10, 1999. He filed by mail his original DFEH complaint, signed and dated March 9, 2000, which was six months long before his statute of limitations was due to run. His statute of limitations was to run as of September 7, 2000.

Also, the Court should note the fact that during the entire period from March 9, 2000 to May 9, 2001 DFEH did

neither of the following: (1) closed Appellant's case file, nor (2) issued a case closure notice to Appellant. As a legislative mandate, DFEH is in charge; not Appellant.

Moreover, DFEH acceptance of this Complaint photocopy ipso facto reaffirms the fact that Appellant's case file was still open since September 10, 1999, was not time barred, and was now resolved, with case closure, on May 9, 2001 with the issuance of the first and only right-to-sue notice that triggered this lawsuit. Hence, the alleged defect, in light of rule § 74, is not fatal to Appellant's cause, in fact, **it is a cure**, and does not reveal a sweeping lack of diligence on either the Appellant or the DFEH.

Hence, the DFEH had an administrative duty to issue the right-to-sue notice to Appellant. The right-to-sue was given on May 10, 2001. Appellant filed this lawsuit on October 31, 2001[5 months after the receipt of his right-to-sue notice]. Based on the foregoing, Appellant, Lloyd Nsek's complaint with the DFEH was timely and in compliance with Government Code, §12960.

II.

FROM THE INSTANT PLEADINGS, THE SAME FACE OF THE DFEH COMPLAINT (BEING A PHOTO-COPY OF THE ORIGINAL FILED BY MAIL) REVEALS CONFLICTING FACTS SUBSTANTIVE TO CONSTITUTE NO CAUSE FOR DEMURRER WITHIN THE MEANING OF CALIFORNIA RULES OF COURT, RULE §128.

The legal context of this petition, falls squarely within the provisions of California Rules of Court, rule §128 that says, *"On appeal from a judgment of a dismissal following the sustaining of a demurrer without leave to amend, the reviewing court must accept as true not only those facts alleged in the complaint but also facts that may be implied or inferred from those expressly alleged."* Given

the adequacy of DFEH documentation to support Appellant's claim and the matters judicially noticed; the Appellate court being fully briefed, and going back to the meaning of rule §128, the following inference may be drawn, which the lower court must accept as true facts: (1) DFEH does not open and close a case on instanter in 24 hours [it takes a process and involves time] even on request of an immediate right-to-sue notice, (2) The Appellant's DFEH case file was not lost but the original complaint [filed by mail], which was either misplaced or lost by DFEH, and (3) **The discretion of the trial court of not relying on the judicial notice of the file but on pleadings to sustain the demurrer shows that it was operating outside the meaning of California rules of Court, rule §128 in that it only accepted as true the alleged May 9, 2001 defect on the face of the DFEH complaint photocopy but failed to also accept [March 9, 2000] fact implied or inferred from the same face of the complaint photocopy as the true date the original complaint was filed by mail, albeit misplaced or lost by DFEH and the matters judicially noticed. As a legal provision under rule §128, the March 9, 2000 filing date of the original complaint places Mr. Nsek in good FEHA standing, six months before his statutes of limitations would run in September 7, 2000. He was wrongfully terminated in September 7, 1999.**

Also, given the legal authority of California rules of Court, rule §74 forbidding the demurrer in this case, by sustaining it, the trial court in fact abused its discretion. This behavior of the trial court not only carries suspicious implications, it is just plain outrageous, in that it violates Appellant's rights under the 14th amendment and blatantly challenges the legal authorities of rule §74 and rule §128 respectively.

Clearly, when the trial court relied not on the judicial notice of the file but on the face of the DFEH complaint

photocopy for the pleadings, it left out key elements of evidence in support of Appellant's claim that show he was within the statute of limitations. As an injurious effect to Appellant's cause, the trial court's behavior shows it simply assumed the truth of contentions, deductions or conclusions of fact or law; namely Govt. Code §12960, erroneously pleaded by Respondent. Moreover, in the hasty, desperate and blind attempt to demurrer this case; Respondent was in breach of rule §74. With all the foregoing facts well taken as a matter of law, it becomes clear that there was no cause for the demurrer.

III.

THIS APPELLATE MATTER BEARS PERFECT CONGRUENCY TO MARSHALL V. GIBSON, DUNN & CRUTCHER CONSTITUTING CAUSE FOR A REVERSAL OF JUDGMENT.

The request of the Appellant that the lower court should vacate the demurrer and rule for a reversal of judgment is legally justified in that Appellant's case falls squarely within the holding in Marshall v. Gibson, Dunn & Crutcher (1995) 37 Cal. App. 4th 1397.

The Appellate court held that the trial court erred in sustaining the demurrer, since the bar of the statute of limitations remained a triable issue which could not be resolved in defendant's favor on the instant pleadings and the matter judicially noticed. A reasonable inference from the allegations of the complaint and the matters judicially noticed was that an underlying action against the general partners for their alleged breach of the agreement involved the adequacy of documentation to support Plaintiff's claim, as well as adequacy of defendant's advice to him concerning his rights under the agreement.

Likewise, in Nsek v. Circle K Stores, there is the adequacy of DFEH documentation to support Appellant's

claim of strict compliance with Govt. Code §12960 (long before May 9, 2001) implied or inferred from the same face of the complaint photocopy itself and the matters Judicially noticed, as well as the adequacy of rule §74 and rule §128 advising both the trial court and Respondent of the legal rights of Appellant within the context of DFEH conduct in this instant. Some of the DFEH documents in question were attached as exhibits 1 thru 4 when the Appellant's opening brief was filed. All others remain as court transcripts at the lower court.

Unless Respondent can show the Court with absolute certainty and with legal authority that (1) The DFEH closed Appellant's case file before May 9, 2001, (2) The DFEH had issued a right-to sue notice, and case closure before May 9, 2001 and Appellant failed to act, and (3) To corroborate Respondent's time barred doctrine, this DFEH matter was open and close instanter on May 9, 2001.

Otherwise, the Court should grant certiorari. In doing so, the Court will not only preserve the Constitutional Rights of the Petitioner under the 14th Amendment but also uphold the meaning of rule §74 as well as rule §128 respectively, in accordance with jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LLOYD U. NSEK, SR.

Date: DECEMBER 16, 2004

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977 (a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977 (b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LLOYD U. NSEK, SR.,	
Plaintiff and Appellant,	E033173
v.	(Super.Ct.No. RCV 058840)
CIRCLE K STORES, INC. et al.,	OPINION
Defendants and Respondents.	

APPEAL from the Superior Court of San Bernardino County. Kenneth G. Ziebarth Temporary Judge. (Pursuant to Cal. Const., art. VI, 21.) Affirmed.

Lloyd Nsek, Sr., in pro. Per., for the Plaintiff and Appellant.

Specter & Levy, Ronald C. Specter and Michael H. Artinian for Defendants and Respondents.

APPENDIX A

1. Introduction

Plaintiff Lloyd U. Nsek, Sr. appeals from the trial court's judgment granting defendant Tosco Marketing Company's demurrer to plaintiff's complaint for employment discrimination on the ground that it was barred by the one-year statute of limitation set fourth in Government Code Section 12960.[1] Plaintiff claims the trial court erred in sustaining the demurrer because he filed his administrative complaint within the statutory period.

We reject plaintiff's claim because the administrative complaint clearly shows that the Department of Fair Employment and Housing (DFEH) received his application after the one-year period. We affirm the judgment.

2. Factual Procedural History

On September 10, 1999, Tosco Marketing Company (Circle K)[2] fired plaintiff, who worked as a manager or assistant manager.

After his termination, plaintiff pursued his administrative remedies by seeking help from DFEH. In response to his inquiry, DFEH scheduled a pre-complaint interview with plaintiff for November 16, 1999. Although plaintiff participated in the intake orientation, he chose not to be interviewed. DFEH sent plaintiff a right-to-sue packet with a complaint application.

On May 8, 2001, a DFEH employee received a telephone call from plaintiff concerning his case. Based on

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1 All further statutory references will be to the Government Code unless otherwise stated.

2 The official company name of plaintiff's employer is Circle K Stores, Inc.

their conversation, the DFEH employee understood that plaintiff took some preliminary steps to file a complaint, but, after receiving the complaint in the mail, failed to sign and return it. In a letter to the DFEH, plaintiff contested this fact and insisted that he had signed and returned his complaint by March 9, 2000. DFEH, however, was unable to verify that plaintiff filed a complaint in a timely manner. The actual complaint is dated March 9, 2000, but stamped as received on May 9, 2001.

On May 10, 2001, DFEH, as requested, provided plaintiff his right-to-sue notice. The notice provides that a "civil action must be filed within one year from the date of this letter."

On October 31, 2001, plaintiff filed his complaint for racial and national origin discrimination, retaliation, and other unlawful employment practices.

On June 24, 2002, defendants filed a demurrer on various grounds, including that plaintiff's complaint was time barred under section 12960.

During the hearing on defendants' demurrer, the court, after taking judicial notice of the DFEH documents, sustained the demurrer with leave to amend.

Plaintiff filed his amended complaint on August 23, 2002. Defendants again demurred to plaintiff's complaint. The court sustained the demurrer without leave to amend.

3. Discussion

Plaintiff claims the trial court abused its discretion in sustaining the demurrer because the evidence showed that he had filed his complaint with DFEH on March 9, 2000.

A trial court's order sustaining a demurrer is

reviewed de novo.[3] Demurrer is appropriate where the complaint includes allegations that clearly disclose some complete defense or bar to recovery.[4] The statute of limitations defense operates as a complete bar to recovery when the defect clearly appears on the face of the complaint.[5]

Under the Fair Employment and Housing Act (FEHA),[6] an employee must first file a complaint with DFEH and obtain a right-to-sue notice before filing a civil action.[7] The administrative complaint must be filed timely.[8] Under section 12960 of FEHA, an administrative complaint is timely when filed within on year of the discriminatory act or unlawful practice.[9]

In this case, the trial court properly sustained defendants' demurrer because plaintiff failed to establish that he complied with section 12960. In his civil complaint, Plaintiff alleged that the discrimination or unlawful practice occurred on or before his termination on September 7, 1999. Plaintiff also alleged that, before filing his civil action, he filed an administrative complaint with DFEH on or about March 9, 2000. However, the administrative complaint which was attached as Exhibit B to plaintiff's first amended

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3 *Wagner v. Apex Marine Ship Management Corp.* (2000) 83 Cal.App.4th 1444, 1448.

4 *Wagner v. Apex Marine Ship Management Corp., supra*, 83 Cal.App.4th at page 1448.

5 *Wagner v. Apex Marine Ship Management Corp., supra*, 83 Cal.App.4th at page 1448.

6 Section 12900 et seq.

7 *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63.

8 *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84.

9 Section 12960; *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th at page 63.

complaint, shows that DFEH received the complaint on May 9, 2001. In reviewing a ruling on a demurrer, we must consider as true the facts contained in exhibits that are attached to the complaint.[10] Plaintiff's attached exhibit, therefore, reveals a fatal flaw, namely, that the plaintiff failed to file the administrative complaint within the statutory period.

Plaintiff, nevertheless, argues that, although he timely filed his administrative complaint, DFEH failed to process his application and issue a right-to-sue letter. Plaintiff essentially argues that any defect in his administrative complaint was caused by DFEH's negligence. In making this argument, plaintiff relies on *Grant v. Comp USA, Inc.* (hereafter *Grant*).[11]

In *Grant*, the plaintiff filed a complaint with DFEH and obtained a right-to-sue notice. DFEH later rescinded its closing letter, which contained the right-to-sue notice, and reopened the matter. Before DFEH reissued a second right-to-sue letter and after the one-year statutory period, the plaintiff filed a civil action. In *Grant*, the court noted that the plaintiff was entitled to a right-to-sue notice within a year of filing an administrative complaint.[12] The court held that, even before completing its investigation, DFEH had a ministerial duty to issue a second notice within the statutory period.[13] DFEH's failure to comply with its duty did not bar plaintiff's action.[14]

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10 *Satten v. Webb* (2002) 99 Cal.App.4th 365, 374-375

11 *Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 673.

12 *Grant, supra*, 109 Cal.App.4th at page 648

13 *Grant, supra*, 109 Cal.App.4th at page 650.

14 *Grant, supra*, 109 Cal.App.4th at page 650

Grant is inapposite. DFEH has no duty to issue a right-to-sue notice where the plaintiff has failed to submit an administrative complaint. While *Grant* excuses the plaintiff from requesting a second right-to-sue letter, the case does not justify any lack of diligence on the part of the plaintiff in filing the initial complaint.

We conclude that the trial court properly sustained defendants' demurrer on the ground that plaintiff failed to comply with section 12960.[15]

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15 Plaintiff's argument concerning defendants' involvement in the court's settlement conference program is inappropriate and will not be considered. (See Evidence Code section 1152; *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 794, fn. 14.)

4. Disposition

We affirm the court's judgment. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/McKinster
J.

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As "Tosco Marketing Company (Circle K)")
JOHN R. WILLIAMS, LUIS CAMPOS, GLORIA
ROBINSON, and ABBT TESFAIOHANNES

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN BERNARDINO - RANCHO CUCAMONGA

LLOYD U. NSEK, SR., Plaintiff,	)	Case No.: RCV 058840
vs.	)	**ORDER DISMISSING ACTION WITH PREJUDICE AFTER HEARING ON DEMURRER**
TOSCO MARKETING COMPANY (CIRCLE K); JOHN R. WILLIAMS LUIS CAMPOS; GLORIA ROBINSON; ABBY TESFAIOHANNES; and DOES 1 Through 100, inclusive,	)	Date of Hearing: October 16, 2002 Department: R-18 Judge: Hon. Kenneth G. Ziebarth
Defendent	)	

APPENDIX B

The Demurrer of the Defendant Circle K Stores, Inc (erroneously sued herein as Tosco Marketing Company (Circle K)), John Williams, Luis Campos, Gloria Robinson and Abby Tesfaiohannes to the First Amended Complaint of Plaintiff Lloyd U. Nsek, Sr., came on for hearing before the above-entitled Court on October 16, 2002. Ronald C. Specter, Esq. Of the Law Offices of Specter & Levy, LLP appeared on behalf of all defendants and Earl A. Beamon II, Esq., appeared on behalf of plaintiff.

After the hearing, the matter was submitted to the Court for a ruling. The Court having read and considered the supporting and opposing Points and Authorities and having heard and considered the arguments of counsel, finds that the First Amended Complaint fails to state facts sufficient to support the causes of action pled in plaintiff's Complaint in that each and every cause of action as set fourth in the Complaint is barred by the applicable statute of limitations.

IT IS THEREFORE ORDERED that defendants' Demurrer to plaintiff's First Amended Complaint for Damages is hereby sustained without leave to amend and that the above-entitled action be, and it hereby is, dismissed with prejudice. Furthermore, Defendants may recover costs of suit here incurred in the sum of $1,146.00

Dated: November 14, 2002

s/Ziebarth
JUDGE OF THE SUPERIOR COURT

Court of Appeal, Fourth Appellate District,
Division Two - No. E033173
S125821

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LLOYD U. NSEK SR., Plaintiff and Appellant,

v.

CIRCLE K STORES et at., Defendants and Respondents.

Petition for review DENIED.

s/GEORGE
Chief Justice

(2)

Supreme Court, U.S.
FILED
MAR 16 2005
OFFICE OF THE CLERK

No. 04 - 826

In The
Supreme Court of the United States

LLOYD U. NSEK, Sr., - *Petitioner*

v.

CIRCLE K STORES et al. - *Respondents*

On Petition For Writ Of Certiorari
To The Court of Appeal for the
State of California Fourth Appellate District
Division Two

PETITION FOR REHEARING

LLOYD U. NSEK, Sr.
IN PROPRIA PERSONA
13225 Lambrusco Ct
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(909) 463 - 7993 Home
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QUESTION PRESENTED

On May 4, 2004 by invitation of the Court of Appeal, Fourth Appellate District, Division Two, the herein petitioner in pro per, Lloyd Nsek, invoked the legal authorities of Statute §74 and Statute §128 in his oral amended pleadings with regards to his discrimination case before the Court. In response, the Appellate Court has remained invariably silent on the amended pleadings leaving petitioner in absolute darkness. In California, informed citizens are aware that these Statutes are within the jurisdictional power of the legislature; they are vital to the welfare of society and are favored by law; they provide all citizens the much needed repose, and as such constitute meritorious defenses. Hence, the petitioner presents the United States Supreme Court with the following question below:

- Is there a separate set of procedural and appellate jurisdictional rules that govern amended pleadings and appeals on demurrers based on statute of limitations, or is society in California to continue to repose its hopes in the efficacy of California rules of Court, rule §74 and rule §128 in the court of law: i.e. (1) an amended complaint supersedes all prior complaints; and (2) a Court of Appeal is not to supplant an amended complaint using silence.

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TABLE OF AUTHORITIES CITED

CASES CITED

Armentrout v. Aaron Rents, Inc., No. 7:01cv757 (W. D. Va. Feb. 27, 2003).

Ebbert v. DaimlerChrysler, PICS NO. 03-0I44

Marston v. AT&T Corp., 210 FRAUD 1679 (E. D. Va. 2002)

STATUTES AND RULES

California Rules of Court, rule §74

California Rules of Court, rule §128

Government Code §12960

Government Code §12965 (b)

OTHER

The United States Constitution: The Fourteenth Amendment.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING

Petitioner respectfully prays that a rehearing on the Petition for a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of The Supreme Court of The United States appears at Appendix A to the petition.

GROUNDS FOR REHEARING

The Petitioner prays the Court to rehear this case on the merits of an intervening circumstance of a substantial effect not previously presented. The circumstance in question involves postal mail delivery in the United States as a very critical factor in the legal arguments in Nsek v. Circle K Stores, et al.

Attached as appendix B to this petition for rehearing, Petitioner herein presents the Court with the evidence of the registered mail envelop that was undeliverable to Respondent for no apparent or justifiable reason. The United States Postal Service records show that Respondent received (1) first delivery notice on 12/17/04, (2) second delivery notice on 12/22/04, and (3) the package was returned on 1/1/05 to Petitioner. Upon receipt, Petitioner mailed the package again the third time to Respondent in order to comply with Rule 29.3 of this Court.

On analysis, it becomes crystal clear that had the package

not been registered, it would have been very difficult to ascertain Petitioner's compliance with Rule 29.3 of this Court. Furthermore, it would have left Petitioner with a burden much too heavy to bear pertaining to either clearing up any doubt or answering any question of whether or not Petitioner did in fact mail the package containing 3 booklets of the petition for a writ of certiorari to Respondent.

As it now stands, this current circumstance places Respondent in the same corner with the Department of Fair Employment and Housing [DFEH] in relation to the Petitioner's contention that he filed by mail the original DFEH complaint, signed and dated March 9, 2000. In light of the present intervening circumstance, the difference between these two situations is that the mail to DFEH was sent uncertified at the time. As a result, the reasonable inference to be drawn from its unaccountability is apt to be that it was either misplaced or lost by DFEH. Given the ensuing problems associated with sending and receiving mail in this case, Petitioner prays the Court not to let Respondent off the hook by affirming the demurrer. It was raised as a technicality to elude justice in the face of circumstance truly beyond Petitioner's control.

Since its inception, the four causes of legal action against Respondent being protected areas of the law have never been contested. Respondent has not contested (1) violation of Government Code Section 12940 (a) - Race & Color Discrimination and Harassment; (2) violation of Government Code Section 12940 (h) and 12926 (m) - National Origin or Ancestry Discrimination & Harassment; (3) Retaliation and violation of Government Code 12940 (h), and (4) violation of Government Code 12940 (k) - Failure to provide or cure Harassment and Discrimination. Therefore, given the foregoing, Petitioner prays the Court to rehear this case on the merits of the following reasons:

1. THE COURT SHOULD NOT PUNISH PETITIONER FOR THE PITFALLS ASSOCIATED WITH MAIL DELIVERY IN THE UNITED STATES.

With Respondent unable to receive a certified mail from Petitioner on two failed attempts, it lends much credence to Petitioner's contention with regards to the DFEH complaint filed by mail, signed and dated March 9, 2000. Taken as a recurring problem, it serves to show that mail delivery is not entirely fool proof (See Ebbert v. DaimlerChrysler, PICS NO. 03-0I44).

As a result, the Court need not punish Petitioner on this instance case of the demurrer at issue by affirming it. The demurrer should be reversed because Petitioner had no control over the mechanics of the delivery of the DFEH complaint filed by mail. Like Respondent's package that was undeliverable on two failed attempts even though it was certified, so was Petitioner's original DFEH compliant which was either misplaced or lost. By all accounts, no one would have known the status of the Respondent's package save for it being certified with return signature requested.

Therefore, as it was held in Armentrout v. Aaron Rents, Inc., No.7: 01 CV 757 (W. D. Va. Feb. 27, 2003), Equal Employment Opportunity Commission's (EEOC) failure to send right-to-sue notice to Armentrout's Counsel excused late lawsuit. On analysis of the case, it was clear to that court that had either Armentrout or her Counsel received the right-to-sue notice by mail the first time from EEOC, Aaron Rents, Inc., would have no issue to argue in court. Nonetheless, when it finally came, Counsel for Armentrout filed lawsuit regardless of the lapse in time, which was of no consequence.

In retrospect, if the DFEH had received as well as acted at first instance of the Petitioner's original complaint filed by mail, signed and dated March 9, 2000, Respondent would have no cause to raise a demurrer. However, when Petitioner finally resolved his case on May 9, 2001 by a walk-in visit to DFEH

with the copy to his original complaint, he was then mailed his right-to-sue notice on May 10, 2001. Upon receipt, Petitioner filed his lawsuit. In doing so, Petitioner was in compliance with Statutes §12960 and §12965 (b) requirements.

2. THE COURT SHOULD AFFIRM THE ACTION OR CONDUCT OF DFEH WHO ACTED IN GOOD FAITH.

When the Department of Fair Employment and Housing [DFEH] accepted Petitioner's copy to the original complaint on May 9, 2001, it acted all in good faith. There was adequacy of documentation at DFEH showing that Petitioner had already opened a case file well within the stipulation of Government Code §12960. All that was pending was the complaint that was sent by mail, which never arrived or was misplaced or lost. Barring all the pitfalls of mail delivery, an appropriate official at DFEH made the determination to accept copy to the original complaint from Petitioner (See Marston v. AT&T Corp., 210 FRAUD 1679 (E. D. Va. 2002).

Unlike Respondent's mail that was returned as undeliverable by virtue of its certified status, the mail to DFEH has suffered an inexplicable fate since it was not certified. However fortunate or unfortunate the present situation is, the only DFEH complaint before the Court is the photocopy of the original, which contains on the same face, clear and affirmative facts to support arguments from both Petitioner and Respondent alike. But in light of the intervening circumstance being Respondent's undelivered registered mail from Petitioner, it is clear that Petitioner did in fact comply with Government Code §12960 as of March 9, 2000 when he filed by mail his DFEH complaint. As a result, it is not enough that the complaint of the demurrer at issue should show that the action may be barred, in the spirit of California Rules of Court, rule §74. The complaint is just a copy of an original. There was adequate proof at DFEH to show intent for strict compliance by

Petitioner. Given the foregoing, to accept the DFEH document of the demurrer at issue, the Court should accept it in total, and not in selective parts, in accordance with the spirit of California Rules of Court, rule §128.

CONCLUSION

The Court should grant this petition being an amended complaint which supersedes all prior complaints in this civil action.

Respectfully submitted,

LLOYD U. NSEK, Sr.
IN PROPRIA PERSONA
13225 Lambrusco Ct
Rancho Cucamonga, Ca 91739
(909) 463 - 7993 Home
(909) 815 - 5635 Cellular
(909) 463 - 7994 Fax

CERTIFICATION OF COUNSEL

I, Lloyd U. Nsek, Sr., herein known as the Petitioner, hereby declare that this petition for rehearing before The Supreme Court of The United States is presented in good faith and not for delay.

SIGNED L. Nsek

DATE: MARCH 15, 2005

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 22, 2005

Mr. Lloyd U. Nsek, Sr.
13225 Lambrusco Court
Rancho Cucamonga, CA 91739

Re: Lloyd U. Nsek, Sr.
v. Circle K Stores, et al.
No. 04-826

Dear Mr. Nsek:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

January 10, 2005

Lloyd Nsek, Sr.
13225 Lambrusco Ct.
Rancho Cucamonga, CA. 91739

Ronald C. Specter, Esq.
Michael H. Artinian, Esq.
SPECTER & WILLOUGHBY LLP
4625 MacArthur Court,
Suite 1150
Newport Beach, CA. 92660

Re: Nsek v. Circle K Stores, et al.

Dear Counsel:

Enclosed are three booklets of the above case made available to you in compliance with the SUPREME COURT OF THE UNITED STATES, Rule 29.3. For your information, this is the third attempt to deliver these booklets to you. Post office records show that you received first notice on 12/17/04, second delivery notice on 12/22/04, and the package was finally returned on 1/1/05. Thanks.

Sincerely,

Lloyd Nsek, Sr.
(Petitioner)

From: LLOYD U. NSEKSR
13225 LAMBERSON CT
RANCHO CUCAMONGA
CA 91739

7004 2510 0004 6241 2091

U.S. POSTAGE
PAID
RANCHO CUCAMONGA, CA
91739
DEC 16, 04
AMOUNT
$6.03
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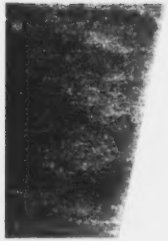
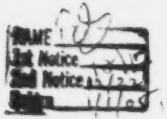
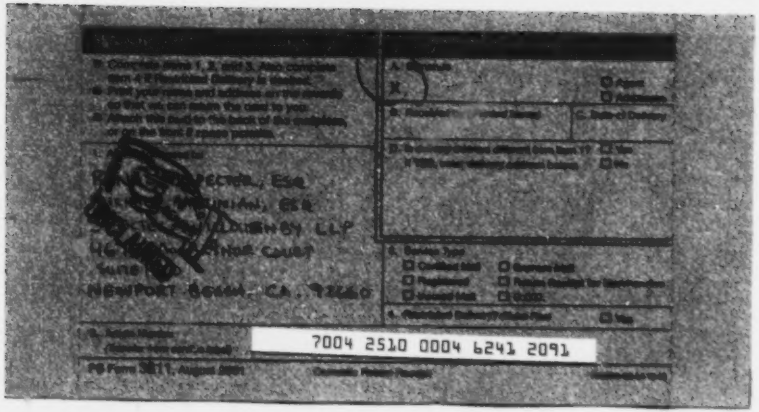




APPENDIX B

8b



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